IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: WAMBALI, J.A., KENTE, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 237 OF 2019

SANDU JOHN .....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga sitting at Mpanda)

(Mashauri, J.)

Dated the 21st day of May, 2019

in

Consolidated Criminal Appeal Nos. 112 and 113 of 2018

JUDGMENT OF THE COURT

25th September & 04th October, 2023

WAMBALI, J.A.:

The High Court of Tanzania, Sumbawanga District Registry, sitting at Sumbawanga in Consolidated Criminal Appeal Nos. 112 and 113 confirmed the findings, convictions and sentences of twenty (20) years imprisonment meted against the appellant, Sandu John and Elisha John respectively by the District Court of Nkasi at Namanyere (the trial court) and ultimately, it dismissed their appeals. Dissatisfied, both jointly and together lodged the instant appeal through a memorandum of appeal

comprised of four grounds of appeal as the first and second appellants respectively.

Initially the appeal was called on for hearing on 11th February, 2022 at the Court Session held at Mbeya. However, hearing could not proceed as Elisha John, the second appellant did not enter appearance because he was not served with the notice of hearing. According to the letter from the Prison Officer In charge of Mollo Prison to the Registrar with Ref. No. 112/RUK/1/Vol. IX/1251 dated 03/02/2022, the whereabouts of Elisha John was unknown since he escaped from lawful custody on 29th January, 2021. The Court adjourned the hearing of the appeal to a date to be fixed by the Registrar to pave way for reservice.

On 25th September, 2023 when the appeal was called on for hearing before us at Sumbawanga, we were availed with a letter from the Prison Officer In charge of Mollo Prison with Ref. No. 110/RUK/1/VOLIII/271 reiterating the same information that the whereabouts of Elisha John (the second appellant) was still unknown after he escaped from custody. Thus, it is only Sandu John, the first appellant who entered appearance.

In the circumstances, Mr Paschal Marungu, learned Principal State Attorney assisted by Ms. Irene Godwin Mwabeza, learned State Attorney who appeared for the respondent, the Director of Public Prosecutions (the

DPP) prayed that the appeal in respect of Elisha John be dismissed under rule 80(1) of the Tanzania Court of Appeal Rules, 2009. We acceded to the prayer and accordingly dismissed the appeal in respect of Elisha John, the second appellant. We will thus in this judgement refer to Sandu John as the appellant in view of the decision we have reached with regard to Elisha John.

At the trial court, the appellant was charged together with Elisha John and Bulugu Tengeneja (not party to the appeal) with the offence of unlawful possession of government trophies contrary to section 86 (1) and (2)(c)(ii) of the Wildlife Conservation Act, Cap 283 read together with Paragraph 14 (d) of the First schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 (now R.E. 2022 (the EOCCA).

It was alleged in the particulars that on 5th September, 2017 at about 08:30 hrs at China Village within Nkasi District in Rukwa Region, the trio were jointly and together found in unlawful possession of four pieces of ivory valued at TZS. 67,212,000.00 the property of the United Republic of Tanzania without permit. Each pleaded not guilty hence a full trial was conducted by the District Court of Nkasi at Namanyere in Economic Crime Case No. 6 of 2017.

The prosecution case was supported by nine (9) witnesses, namely, Ramadhani Juma Isomanga (PW1), Gift Eliahika (PW2), Georgratius Juma Kayela (PW3), G.7484 D/C Hussein (PW4), Evans Damiano Tenganamba (PW5), Justine Mary Card Kapembwa (PW6), H.310 D/C Samwel (PW7), WP 8006 Hanipha (PW8) and WP. 10389 D/C Scolastica (PW9). In addition, four pieces of ivory and seven documentary exhibits, to wit, search order, caution statements of Elisha John, Sandu John and Burugu Tengeneja, the chain of custody records, certificate of identification of trophies and station diary were tendered and admitted as exhibits.

It was the prosecution case that the trio were arrested within Lwafi Game Reserve riding two motorcycles ridden by PW5 and PW6 in possession of four pieces of ivory mixed with sugarcane that were hidden in a polythene bag. It was further the prosecution evidence that when they were interrogated by PW7, PW8 and PW9, they confessed to have committed the offence and recorded confessional statements which were admitted in evidence as alluded to above.

At the conclusion of the trial, the trial magistrate evaluated the evidence for both sides and was fully satisfied that the appellant and Elisha John were guilty of the offence charged, convicted and sentenced each to twenty (20) years imprisonment. However, he conclusively found

that the prosecution did not prove the case beyond reasonable doubt against Burugu Tengeneja. Hence, he acquitted him of the offence charged. As intimidated earlier, the consolidated appeals involving the appellant and Elisha John before the High Court were dismissed hence this second appeal.

At the hearing of the appeal, the appellant who appeared in person without legal representation simply urged us to consider and determine his four grounds of appeal which basically revolved on the complaint that the prosecution case was not proved to the hilt and urged us to allow the appeal.

In response, Ms. Mwabeza submitted that before considering the appeal based on the appellant's ground of appeal, she had noted the fundamental irregularity in the consent of the Director of Public Prosecutions authorising the prosecution of the appellant and two others. In her opinion, the irregularity rendered the trial court to lack jurisdiction to try the case against the appellant and others. She thus prayed for leave to argue the respective point of law and we accordingly granted the request.

Ms. Mwabeza submitted that according to section 3 (1) (3) (a) (b) of the EOCCA, the jurisdiction to determine corruption and economic

crime cases is vested in the High Court Corruption and Economic Crimes Division. However, she submitted, in terms of section 26 (1) of the EOCCA, no trial in respect of an economic offence may be commenced under the Act without the consent of the DPP. Besides, she added, under section 26(2) of the EOCCA, the DPP can also delegate the said power to an officer or officers subordinate to him to issue consent to the prosecution of economic crimes case as may be specified through the requisite notice. She argued further that apart from the consent, the DPP or any State Attorney authorised by him may in appropriate cases involving an offence triable by the High Court under the EOCCA issue a certificate directing that the same be tried by such court subordinate to the High Court as prescribed by section 12 (3) and (4) as the case may be.

Unfortunately, she submitted, in the case at hand, the consent to prosecute the appellants and others was erroneously issued by the Prosecution Attorney In- charge of Rukwa Region under section 26 (1) instead of section 26 (2) of the EOCCA. In her submission, the said consent to prosecute the appellant therefore was invalid because the authorising State attorney was not the DPP. More importantly, she added, though the certificate conferring jurisdiction to the District Court of Nkasi at Namanyere to try the case was properly issued under section 12 (3) of

the EOCCA, the prosecution of the appellant and two others were null and void as there was no valid consent of the DPP.

To support her submission, she made reference to the decision of the Court in **Peter Kongori Maliwa and 4 Others v. The Republic**, (Criminal Appeal No. 252 of 2020) [2023] TZCA 17350 (14 June 2023, TANZLII). In the circumstances, the learned State Attorney submitted that lack of consent rendered the proceedings of the trial and the first appellate courts a nullity.

In the circumstances, Ms. Mwabeza ultimately urged us to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) to nullify the proceedings of both courts below, quash the conviction and set aside the sentence imposed on the appellant.

On the other hand, she submitted that ordinarily upon the proceedings of the two courts below being nullified, a retrial would have been an appropriate remedy to be sought by the DPP where no miscarriage of justice would be occasioned. However, she refrained to take that course on the contention that a retrial will enable the prosecution to fill gaps in the evidence. She backed her submission by arguing that during the trial, all documentary evidence tendered by the prosecution were not read over after they were admitted in evidence and thus, they

were wrongly relied on in evidence to ground the conviction of the appellant.

Indeed, she added, even if the trial would have been properly before the trial court, the respective exhibits could have suffered the wrath of being discounted from the evidence on record and therefore, the remaining oral evidence of PW7, PW8 and PW9 could not be left to stand on its own. Besides, she argued that the evidence of PW5 and PW6 could not stand without the evidence of PW7, PW8 and PW9 being supported by the documentary exhibits. She emphasised that even the oral evidence of PW3 who tendered the four (4) pieces of ivory is of no assistance as before he tendered the same, he did not lay a foundation on how he identified them as an expert in that area. In this regard, she submitted that it is doubtful if the said ivory were the same with those allegedly found in possession of the appellant when he was arrested at the scene of crime.

In the circumstances, Ms. Mwabeza prayed that the appellant should be released from custody because even during retrial the case for prosecution will not be proved to the required standard without filling the gaps apparent in the initial trial.

In rejoinder, the appellant supported the learned State Attorney's submission and urged us to order his release from custody. He maintained that he did not commit the offence charged as alleged by the prosecution.

Having heard the submissions of Ms. Mwabeza and perused the consent presented at the trial court, we agree that it was invalid as the learned Prosecuting State Attorney In- charge purportedly issued it under section 26 (1) of the EOCCA while she was not the DPP as prescribed under that provision.

For clarity, section 26 (1) and (2) of the EOCCA provides:

> *"(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*
>
> *(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to*

him as he may specify acting in accordance with his general or special instructions."

It is based on subsection (2) of section 26 of the EOCCA that the DPP issued the Economic Offences (Specification of Offences Exercising Consent) Notice, 2014, G.N. No. 284 of 2014 published on 15th August, 2014 in which consent in respect of the offences specified under Part I could only be issued by the DPP himself while those under Part II could be issued by officers subordinate to him, that is, the State Attorney In-charge for the Region or District in which the economic offence took place.

Indeed, though the Prosecuting Attorney In- charge purported to issue the consent under section 26 (1) of the EOCCA, the offence with which the appellant was charged did not fall under Part I but Part II of GN. No. 284 of 2014. It is noteworthy that G.N. No. 284 of 2014 was revoked and replaced by the Economic Offences (Specification of Offences for Consent) Notice, 2021 G.N. No. 496H of 2021 published on 30th June, 2021. Currently, Paragraph 3 of the respective G.N. provides as follows with regards to delegation of power to issue consent:

"3. -(1) The prosecution of economic offences specified in this Notice requires the consent of the Director of Public Prosecutions and such consent may be issued by him in person.

(2) The prosecution of economic offences specified in Part I of the Schedule shall require the consent of the Director of Public Prosecutions in person.

(3) The power to consent to the prosecution of economic offences specified in Part II of the Schedule to this Notice is hereby delegated to and may be exercised by the Deputy Director of Public Prosecutions or the Director.

(4) The power to consent to the prosecution of economic offences specified in Part III of the Schedule to this Notice is hereby delegated to and may be exercised by the Regional Prosecutions Officer of the Region or District Prosecutions Officer of the District where the offence took place or the Prosecution Attorney In-charge of the Court of Resident Magistrate or District Court where the economic offence is charged.

(5) Notwithstanding, the provisions of subparagraph (4), nothing in this section shall preclude the Deputy Director of Public Prosecutions or the Director from issuing consent for offences under Part III of the Schedule."

All in all, since the consent of the DPP in the case under our consideration was invalid, the appellant was wrongly prosecuted before the trial court. Therefore, lack of the requisite consent rendered the certificate conferring the jurisdiction to the trial court to have no bases though it was properly issued under section 12 (3) of the EOCCA.

In **Peter Kongori Maliwa and 4 Others v. The Republic** (supra) the Court stated that:

> *"In this case, consent was issued by the State Attorney In charge instead of the DPP. That was a serious irregularity as the power to issue a consent under section 26(1) of the EOCCA is not delegable. It is absolutely vested in the DPP himself. As such, the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to try the economic offences."*

Similarly, in the case under scrutiny, since the Prosecution Attorney In- charge purported to issue the consent under section 26 (1) of the EOCCA which was not within her mandate, it amounted to no consent at all authorising the prosecution of the appellant by the trial court. In the event, the proceedings of the trial court were a nullity as it could not assume the jurisdiction without the requisite consent to prosecute the appellant as required by law. Ultimately, the proceedings of the first appellate court were also null and void as they emanated from nullity proceedings of the trial court. We therefore, conclude that the appellant was wrongly prosecuted at the trial court.

On the way forward, we entirely agree with Ms. Mwabeza that considering the irregularities in relying on the documentary exhibits which

were not read over after they were admitted in evidence and the consequences which should follow, the remaining oral evidence of the prosecution witnesses lack support to be able to advance the prosecution case against the appellant. We also agree with her that considering the failure of PW3 to lay a clear foundation of the nature of the four pieces of ivory which were allegedly found in possession of the appellant, ordering a retrial will give chance to the prosecution to shape its case and fill the gaps. Consequently, a miscarriage of justice will be occasioned on the appellant rendering the retrial unfair.

It is common knowledge that the exercise of power to order retrial depends on the facts and circumstances of each case. Therefore, before deciding to order retrial or not, the appellate court must closely keep in view that while protecting the rights of the accused to a fair trial and due process, those who seek protection of the law do not lose hope in the legal system. In short, the interest of justice and those of the society should also not altogether be overlooked in deciding whether to order a retrial or otherwise.

Guided by the settled position, we are of the view that this is not a case in which there are exceptional circumstances to convince us to order a retrial as correctly submitted by the learned State Attorney.

From the foregoing, we invoke the provisions of section 4 (2) of the AJA to revise and nullify the proceedings of both the trial and first appellate courts, quash conviction and set aside the sentence meted on the appellant.

Consequently, we order that the appellant be released from custody immediately, unless lawfully held for lawful causes.

DATED at **SUMBAWANGA** this 04th day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 04th day of October, 2023 in the presence of appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the respondent/Republic and in the absence of 2nd appellant is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E.G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL